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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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In the Matter of ) PR Docket No. 93-35  
 )  
Amendment of the Commission's Rules To ) RM-7986  
Provide Channel Exclusivity to Qualified)  
Private Paging Systems At 929-930 MHz )

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**PETITION FOR PARTIAL RECONSIDERATION**

**AMERICAN MOBILEPHONE, INC.**

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**PETITION FOR PARTIAL RECONSIDERATION**

American Mobilphone, Inc. ("AMI"), by its counsel and pursuant to Section 1.429 of the Commission's Rules, hereby submits its Petition for Partial Reconsideration (the "Petition") of the Commission's Report and Order, FCC 93-479, released November 17, 1993 ("R&O"). <sup>1/</sup> In the R&O, the Commission amended its rules to provide channel exclusivity for 900 MHz private carrier paging ("PCP") systems that satisfied certain requirements.

I. Introduction

On March 31, 1993, the Commission released a Notice of Proposed Rule Making ("NPRM") in the above-referenced docket. The NPRM was premised upon a Petition for Rule Making filed by the National Association of Business and Educational Radio, Inc. ("NABER"), and proposed several amendments to Part 90 of the Commission's Rules designed to enable licensees of private carrier paging systems to obtain channel exclusivity on local, regional and national levels. For systems that qualified for channel

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<sup>1/</sup> This Petition for Reconsideration is timely filed under Sections 1.4(b) and 1.429(d) of the Rules. Though released by the Commission on November 17, 1993, the text of the Report and Order upon which the Petition is based was not published in the Federal Register until November 26, 1993. The instant Petition is filed within 30 days of Federal Register publication.

exclusivity and proposed more than 30 transmitters, the Commission provided an extended construction period (the "slow-growth option") allowing applicants up to three years to construct these larger systems.

AMI filed applications for 77 transmitter sites in four contiguous southeastern states after the NPRM was issued. The system, as designed by AMI, qualified for channel exclusivity and the slow-growth option. AMI factored in the slow-growth option when planning the construction and financing schedule for its regional system.

The R&O, without explanation, limited eligibility for the slow-growth option to applications filed after October 14, 1993, thus making the AMI system ineligible. R&O at ¶ 23. Without the benefit of the slow-growth option, AMI will not be able to meet the construction deadline for its regional system. The decision to limit the slow-growth option to new applicants was made arbitrarily, without notice and is against public policy. AMI seeks reconsideration of the Commission's decision to limit eligibility for the slow-growth option to post-October 14, 1993 applicants. Any application filed after the NPRM and which therefore reasonably relied upon the availability of the already-announced slow-growth option, should be able to avail itself of that option.

## II. AMI's Involvement in 900 MHz PCP Licensing

AMI has a history of involvement in the paging industry. It is the largest paging company in Alabama, operating in the 152 MHz,

454 MHz and 462 MHz bands. (Some of AMI's facilities are licensed under Part 22, some under Part 90). <sup>2/</sup> AMI is precisely the type of company the FCC had in mind when it proposed 929 MHz exclusivity. AMI had tens of thousands of 462 MHz PCP customers and was clogging that band because 929 MHz equipment is more expensive. The FCC proposed exclusivity as a way to encourage migration and expansion via 929 MHz. Upon issuance of the NPRM, AMI designed a new 929 MHz regional PCP system to complement its existing systems and provide channel-exclusive operation for its users. AMI completed its system design and filed its applications with NABER on May 18, 1993.

In the R&O, the Commission, for reasons unknown and unexplained therein, decided that the slow-growth option would be available only to new applicants that filed all of their applications after October 14, 1993. R&O n.43. It would not be available to "grandfathered licenses" (i.e., licenses granted based on applications filed before October 14, 1993). R&O, nn. 43,64.

Without the benefit of the slow-growth option for which it qualified under the NPRM, AMI will not be able to meet the eight-month construction deadline for all 77 sites. <sup>3/</sup> If AMI fails to meet the construction deadline, then the system will not be eligible for channel exclusivity, placing AMI at a tremendous

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<sup>2/</sup> AMI also operates in Georgia, Florida, West Virginia, Kentucky and Ohio. It sold its Texas operations two years ago.

<sup>3/</sup> Because of FAA and similar matters, AMI's 929 MHz licenses were granted at various different times. The first was granted on or about August 20, 1993. The last is still pending today.

competitive disadvantage. Allowing only "new" (i.e. post-October 14, 1993) applicants to qualify for the slow-growth option creates an anomaly that prejudices other licensees that have designed regional systems and filed applications consistent with the NPRM, as against new applicants, with no plan and no track record. This result is counter to the Commission's mandate to serve the public interest, convenience and necessity. <sup>4/</sup>

III. The NPRM Did Not Provide Notice that Only Post-R&O Applicants Would Be Eligible for the Slow Growth Option

The NPRM proposed that "applicants seeking to build a system comprised of more than 30 transmitters could be granted up to three years to construct based on a showing of reasonable need for the extension, a detailed construction timetable and evidence of financial ability to construct the system." NPRM at ¶ 31. There was no reason for AMI to believe that it would not be considered an "applicant seeking to construct" a regional system.

The Commission recognized in the NPRM that "frequency sharing has inhibited the development of wide-area paging systems." NPRM at ¶ 15. The Commission also noted that multi-transmitter systems "require licensees to make a significant capital investment to

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<sup>4/</sup> One of the Commission's primary responsibilities is to assure that new service is provided to the public as expeditiously as possible. If AMI had waited until after the R&O to file its applications, it would have qualified for the slow growth option, but it would have delayed AMI's ability to provide this new service. The Commission must reconsider a decision that produces such a result. Moreover, for AMI to have waited probably would have rendered AMI ineligible to apply, as other licensees would have been grandfathered on AMI's 929.8125 MHz frequency. At least one other person apparently qualifies for grandfathered exclusivity on that channel.

build a qualifying system" and that the plan to provide channel exclusivity for systems with 70 or more transmitters in no more than 12 adjacent states "would encourage the development of regional paging systems. NPRM at ¶ 18, 24. Finally the Commission stated "it is appropriate to grant exclusivity to licensees who are already operating systems that meet our criteria for exclusivity. This does not constitute a preference at all, but simply reflects the investment that these licensees have already made at 900 MHz when other potential applicants chose not to." NPRM at ¶ 35. <sup>5/</sup>

Based on its reading of the NPRM, AMI developed a plan for a regional system that would conform with the requirements of the NPRM. In developing the plan, it counted on being eligible for the slow-growth option. AMI was confident that it would be eligible for the slow-growth option based on the eligibility criteria set forth in the NPRM. Having no notice that the Commission intended to depart from the NPRM and allow only post-R&O applicants to apply for the slow-growth option, AMI had no reason to comment. The Commission failed to notify AMI that the Commission was considering rendering pre-October 14, 1993 applicants ineligible for the slow-growth option.

The Administrative Procedure Act provides that any agency's notice of proposed rule making shall contain "either the terms or substance of the proposed rule or a description of the subjects and

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<sup>5/</sup> This language implies that the slow-growth option should be available to pending applicants, that have made a similar commitment to 900 MHz PCP systems, but not to new applicants that have failed to make the commitment. The resulting R&O and adopted rules had the opposite effect.

issues involved." 5 U.S.C. § 553(b)(3). The Commission has codified that mandate. 47 C.F.R. § 1.413(c). The adequacy of an agency's notice is determined by examining "whether the agency's notice would fairly appraise interested persons of the subjects and issues of the rule making." National Black Media Coalition v. F.C.C., 791 F.2d 1016 (CA2 1986). The failure to present alternatives to the proposed rules undermines the intent of the rule making procedure, because it keeps potentially affected parties from determining that they might be affected by the adopted rules. See Spartan Radiocasting Co. v. F.C.C., 619 F.2d 314 (CA4 1980), citing, Rodway v. U.S. Department of Agriculture, 514 F.2d 809, 814 (D.C. Cir. 1975); American Iron & Steel Institute v. EPA, 568 F.2d 284, 291 (CA3 1977). If the adopted rules differ significantly from the proposed rules, then courts can invalidate the rules. AFL-CIO v. Donovan, 757 F.2d 330 (DC Cir 1985).

The question of whether the slow-growth option would be available to some persons but not others based solely upon the timing of the filing of applications was never raised, nor was the notion of providing the slow-growth option only to post-R&O applicants discussed. Neither the NPRM nor the proposed rules indicated that the Commission was contemplating so limiting the slow-growth option. This Petition is the first opportunity AMI has had to address this question. Thus, the FCC did not satisfy its APA notice requirement. <sup>6/</sup>

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<sup>6/</sup> If the adopted rule can be construed as a "logical outgrowth" of the proposed rules, then the notice requirement is presumed to have been satisfied. AFL-CIO v. Donovan, supra. Based



#### IV. The Decision to Make Pending Applicants Ineligible for the Slow-Growth Option Is Arbitrary and Capricious and Prejudices AMI

The Commission's decision to exclude parties like AMI from taking advantage of the slow-growth option is arbitrary and capricious. There is no rational basis for such a result. It is difficult for AMI to rebut the Commission's rationale for excluding AMI, since the Commission never articulated that rationale. See Part III, supra. However, assuming that the Commission's rationale was to limit eligibility to those who reasonably relied upon a slow-growth option in designing their systems, that rationale is best served by limiting slow-growth eligibility to those that filed post-NPRM, not post-R&O. After all, the slow-growth option was first set forth in the NPRM, not in the R&O.

Conversely, leaving the eligibility cut-off at the October 14, 1993 serves no purpose. No member of the affected industry changed its behavior vis-a-vis deciding to build a regional 929 MHz PCP system on that date. And the Commission would be hard-pressed to explain why one licensee, filing on October 15, is eligible, but another, filing October 13, 1993, is not eligible. At least if the March 21, 1993 release date of the NPRM is utilized, the Commission can have an explanation if challenged in court.

#### VI. Conclusion

The Commission failed to provide notice of its intent to allow only post-R&O applicants to take advantage of the slow-growth

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on the language in the NPRM, the exclusion of applicants that filed post-NPRM but pre-R&O from eligibility for the slow-growth option cannot be seen as a "logical outgrowth" of the NPRM.

option. AMI relied on the availability of the slow-growth option in designing and planning for construction of its regional 929 MHz PCP system. The decision to limit the slow-growth option to post-R&O applicants is not a "logical outgrowth" of anything presented in the NPRM or the comments.

The restrictive application of the slow-growth option is contrary to the Commission's mandate to serve the public interest. The eight-month build out period will not be enough time for "grandfathered licensees" that relied upon the NPRM to construct their systems, so the roll-out of wide-area 929 MHz PCP systems will have to wait until new applicants design and plan construction of such systems. The decision is arbitrary and capricious because, absent any justification and without providing an opportunity for public comment, the Commission changed its policy and placed post-NPRM, pre R&O applicants in a materially inferior position.

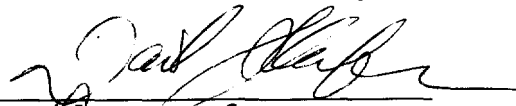
The Commission should reconsider its departure from the NPRM and amend its policy and allow those otherwise-eligible applicants that filed post-March 31, 1993 to qualify for the slow-growth option.

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Respectfully submitted,  
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